Supreme Court, U.S.
FILED

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No.

In The

Supreme Court of the United States

October Term, 1997

VIRGINIA S. CONRAD, Legal Representative of RICK S. CONRAD, deceased,

Petitioner,

vs.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where strict scrutiny of a statute derogating the federal government's sovereign immunity would result in absurdity and contravene the express purpose of the statute, is it appropriate to look to legislative history and to employ other canons of statutory construction to determine congressional intent.

Does a claim filed under the National Vaccine Injury Compensation Act for injury incurred as a result of a DPT vaccination survive the death of the vaccine recipient when such death is not a direct sequela of the vaccination.

PARTIES TO THE PROCEEDING

Virginia S. Conrad, legal representative of Rick S. Conrad, deceased, is the petitioner in this action and the Secretary of Health and Human Services is the respondent.

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Petitioner, Virginia S. Conrad ("Mrs. Conrad"), legal representative of Rick S. Conrad ("Decedent"), respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Federal Circuit is not published but is attached hereto as Appendix A. The judgment and order of the United States Court of Federal Claims are also unpublished and attached hereto as Appendix B and Appendix C respectively. The decision of the Special Master in the United States Court of Federal Claims is attached hereto as Appendix D.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit ("Court of Appeals") was entered on March 11, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 300aa-11 of the National Vaccine Injury Compensation Act (42 U.S.C. § 300aa-11) states, in pertinent part:

> **(a) General rule**
>
> (1) A proceeding for compensation under the Program for a vaccine-related injury or death shall be initiated by service upon the Secretary and the filing of a petition with the United States Claim Court.

(2)(A) No person may bring a civil action for damages in an amount greater than $1,000 or in an unspecified amount against a vaccine administrator or manufacturer in a State or Federal court for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after the effective date of this subpart, and no such court may award damages in an amount greater than $1,000 in a civil action for damages for such a vaccine-related injury or death, unless —

> (i) A petition has been filed, in accordance with section 300aa-16 of this title, under subsection (b) of this section for compensation under the Program for such injury or death.
>
> (ii) the United States Claims Court has issued a judgment under section 300aa-12 of this title on such petition, and
>
> (iii) such person elects under section 300aa-21(a) of this title to file such an action.

(B) If a civil action which is barred under subparagraph A is filed in a State or Federal court, the court shall dismiss the action. . . .

* * *

(b) Petitioners

(1)(A) Except as provided in subparagraph (B), any person who has sustained a vaccine-related injury, the legal representative of such person if such person is a minor or disabled, or the legal representative of any

person who died as a result of the administration of a vaccine set forth in the Vaccine Injury Table may, if the person meets the requirements of subsection (c)(1) of this section, file a petition for compensation under the Program.

42 U.S.C. § 300aa-15(a)(1)(B) provides:

(B) Subject to section 300aa-16(a)(2) of this title, actual unreimbursable expenses incurred before the date of the judgment awarding such expenses which —

> (i) resulted from the vaccine-related injury for which the petitioner seeks compensation,
>
> (ii) were incurred by or on behalf of the person who suffered such injury, and
>
> (iii) were for the diagnosis, medical or other remedial care, rehabilitation, developmental evaluation, special education, vocational training and placement, case management services, counseling, emotional or behavioral therapy, residential and custodial care and service expenses, special equipment, related travel expenses, and facilities determined to be reasonably necessary.

STATEMENT OF THE CASE

The principal question presented in this case is whether a claim filed under the National Vaccine Injury Compensation Act for injuries incurred as a result of a DPT vaccination survives the death of the vaccine recipient when such death is not a sequela of the vaccination. Resolution of this question requires a determination as to whether Congress, in waiving the federal government's sovereign immunity to suit, limited such waiver to instances in which the injured vaccine recipient is alive.

A. Purpose and Funding of The National Vaccine Injury Compensation Act

Congress enacted the National Vaccine Injury Compensation Act ("the Act") in 1986. The Act provided a comprehensive no-fault compensation program for individuals who sustained injuries or death from specified vaccines. The Act also preempted original actions filed in state or federal court, requiring claimants to first follow the procedures set forth in the Act.

The purpose of the Act was twofold. First, Congress intended to create a "compensation program under which awards can be made to vaccine-injured persons quickly, easily, and with certainty and generosity." H.R. Rep. No. 99-908, Part 1, 99th Cong., 2d. Sess. 3, 13 (1986). Second, it was hoped that "the relative certainty and generosity of the system's awards will divert a significant number of potential plaintiffs from litigation." *Id.* at 13.

The Act created two different methods of funding for vaccines administered before and after October 1, 1988. Compensation for injuries or death associated with vaccines administered before October 1, 1988 is paid from general

government revenues. 42 U.S.C. § 300aa-15(j). Compensation for injuries or deaths associated with vaccines administered on or after October 1, 1988 is paid from the Vaccine Injury Compensation Trust Fund, which is funded by a manufacturers' excise tax. 42 U.S.C. § 300aa-15(i)(2).

B. Summary of Facts *Sub Judice*

Decedent was born on January 1, 1954. He received his third DPT vaccination on April 5, 1954 and, within 72 hours, was hospitalized with symptoms of fever, irritability and respiratory distress. On May 20, 1954, Decedent was noted as suffering from paresis. Decedent's physicians believed Decedent suffered from a neurologic disease and initially diagnosed poliomyelitis. Decedent's subsequent medical records state that he suffered from stenosis, hydrocephalus and mental retardation. Decedent died on July 23, 1981 from factors unrelated to the vaccination.

C. Summary of Case Below

On October 1, 1990, Mrs. Conrad, the legal representative of Decedent, filed a *pro se* petition for compensation in the United States Court of Federal Claims. The petition alleged that Decedent had suffered an encephalopathy as a result of his DPT vaccination and that Decedent subsequently died as a direct sequela of the vaccination. In support of her petition, Mrs. Conrad submitted Decedent's medical records and the report by Dr. Marcel Kinsbourne. On February 14, 1997, after Dr. Kinsbourne withdrew from the case, Mrs. Conrad filed the report of Dr. John P. Conomy. In a supplemental report, Dr. Conomy asserted that the Decedent suffered symptoms set forth in the Vaccine Injury Table and that the onset of these symptoms occurred within 72 hours of his third DPT vaccination. Dr. Conomy also asserted that Decedent's death was not a direct sequela of the vaccination.

The special master held a status conference on May 27, 1997. At this conference, she observed that Dr. Conomy's report concluded Decedent's death was not caused by administration of his DPT vaccination. The special master then concluded that Mrs. Conrad had failed to meet the burden of proof necessary to establish a claim under the Act. The special master entered her written decision dismissing the case on May 29, 1997 (App. D).

Mrs. Conrad filed a timely motion for review with the court pursuant to RCFC Appendix J. The court affirmed the special master's decision in its order of July 30, 1997 (App. C) and entered judgment on August 19, 1997 (App. B). Mrs. Conrad then appealed to the United States Court of Appeals for the Federal Circuit. That court affirmed the Court of Claims Decision, without opinion, on March 11, 1998 (App. A).

D. Summary of the Court of Federal Claims Decision

The special master dismissed the case based upon her finding that Mrs. Conrad had failed to present evidence demonstrating Decedent died as a sequela of his DPT vaccination. The special master's decision did not directly address the question of whether claims for vaccine-related injuries survive the death of the vaccine recipient.

In its order of July 30, 1997, the Court of Federal Claims held the Act does not permit an action by the legal representative of a deceased vaccine recipient whose death did not result from a vaccination (App. C at 6a). The court cited to 42 U.S.C. § 300aa-11(b)(1)(A), which identifies those persons who can file a petition for compensation under the Act, and its previous decision in *Buxkemper v. Secretary of Health & Human Services*, 32 Fed. Cl. 213 (1994). Specifically, the court found that while the Act expressly permits a legal representative to file a petition on behalf of an injured vaccine recipient who is a minor or

disabled, or on behalf of a recipient who has died as a result of the vaccination, the Act does not expressly provide for actions brought by a legal representative for injured vaccine recipients who have subsequently died from other causes. Therefore, the Court concluded Congress did not intend to permit such actions.

In its order, the court further acknowledged that 42 U.S.C. § 300aa-11(a) prohibits a legal representative from filing any original action for vaccine-related injuries or death in state or federal court. Ostensibly, this prohibition, coupled with the Court's conclusion that vaccine injury claims filed pursuant to the Act do not survive the death of the recipient, would preclude all such actions. The court, however, concluded the Act permits the legal representative of a deceased vaccine recipient to file a petition in the Court of Federal Claims for the limited purpose of obtaining a judgment that can be rejected pursuant to 42 U.S.C. § 300aa-21(a)(2) (App. C at 6a).

REASON FOR GRANTING THE WRIT

THE PETITION SHOULD BE GRANTED BECAUSE THE LOWER COURTS' STRICT CONSTRUCTION OF 42 U.S.C. § 300aa-11(b)(1)(A) CONTRAVENES CONGRESSIONAL INTENT AND RESULTS IN ABSURDITY.

Whether an action filed in federal court abates on the death of a party or survives to his personal representative depends upon the type of case before the court. In a diversity action, abatement or survival depends upon the law of the state in which the action accrued. *McManus v. Lykes Bros. S.S. Co.*, 275 F. Supp. 361 (D.C. La. 1967). In a federal question case, abatement or survival depends upon pertinent federal law. *Roberson v. N.V. Stoomvaart Maatschappij*, 507 F.2d 994 (5th Cir. 1975). As the instant case was brought under federal law,

determination of whether Petitioner's claim for Decedent's injuries survived Decedent's death requires judicial interpretation and construction of the Act's provisions.

When interpreting the provisions of a statute, a court's primary duty is to ascertain the legislature's intent and purpose in enacting the statute. To facilitate interpretation, court's have adopted canons of statutory construction. The first canon requires a court to give words and phrases in a statute their plain and ordinary meaning. As this Court has noted,

> the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms.

Caminetti v. United States, 242 U.S. 470 (1917).

Application of the plain meaning rule to 42 U.S.C. § 300aa-11(a)(2)(A) demonstrates that Congress intended to prohibit parties from filing all civil actions in state or federal court seeking damages in excess of $1,000 for injury or death without first complying with the requirements of the Act. To pursue a state or federal action for any injury or death resulting from administration of a specified vaccine, a claimant first must: (1) file a petition with the Court of Federal Claim in accordance with 42 U.S.C. § 300aa-16 and conforming with the requirements of 42 U.S.C. § 300aa-11(b); receive a judgment from the court under 42 U.S.C. § 300aa-12; and, (3) reject the court's judgment pursuant to 42 U.S.C. § 300aa-21(a) and file a complaint in state or federal court. 42 U.S.C. § 300aa-11(a)(2)(B) requires state and federal courts to dismiss actions against vaccine manufacturers and administrators where the plaintiff has not complied with 42 U.S.C. § 300aa-11(a)(2)(A). Because the statute expressly prohibits all original actions for

damages arising from a vaccine-related injury or death, Petitioner could not file a state action, on behalf of Decedent, without first complying with the Act.

In addition, 42 U.S.C. § 300aa-15(a)(1)(B)(ii) expressly permits payment of compensation for certain expenses incurred by another on behalf of an injured vaccine recipient.

Respondent does not contest Petitioner's interpretation of 42 U.S.C. § 300aa-11(a). Rather, Respondent claims that 42 U.S.C. § 300aa-11(b) expressly precludes a legal representative of an injured vaccine recipient from pursuing a claim under the Act where the vaccine recipient has subsequently died from causes unrelated to the vaccine. Such conclusion does not comport with the language of the statute. Nor does such conclusion comport with the Court of Federal Claims finding that:

> [t]he language of section 42 U.S.C. § 300aa-11(b)(1)(A) offers no specific affirmative or negative guidance as to whether compensation is allowed for a vaccine-related injury to the estate of a child, when a death has occurred which was found to be unrelated to the administration of the vaccine.

Buxkemper, 32 Fed. Cl. at 223-224. Accordingly, it is necessary to apply other canons of construction to determine whether Congress permitted survival of vaccine injury claims.

Respondent argues that, because compensation for vaccine-related injuries which occurred before October 1, 1988 are paid out of government funds, the statute constitutes a waiver of the government's sovereign immunity. Therefore, Respondent argues that the provisions of the statute must be strictly construed against such waivers. Strict construction is nothing more than a

method of interpretation which limits the statute by the words used. *Chrisman v. Terminal Ass'n of St. Louis*, 157 S.W.2d 230, 234 (Mo. Ct. App. 1942). In other words, strict construction generally requires interpretation by textual analysis rather than analysis of extrinsic sources.

It cannot be disputed that Congress consented to vaccine suits against the government when it passed the Act. The Act expressly permits such actions. Rather, the question in this case is whether Congress, in waiving the government's sovereign immunity, limited recovery for vaccine-related injuries to instances where the vaccine recipient is still alive.

In holding that Congress did not permit survival of personal injury actions under the Act, the lower courts applied the doctrine of *expressio unius est exclusio alterius* ("the expression of one is the exclusion of the other"). Specifically, the courts found that while 42 U.S.C. § 300aa-11(b)(1)(A) expressly permitted legal representatives to file petitions on behalf of injured recipients who are minors or disabled, and permitted legal representatives to file petitions on behalf of recipients who died as a result of the administration of a vaccine, the statute did not mention petitions filed by a legal representative on behalf of an injured recipient who died from other causes. Accordingly, the lower courts concluded that such omission evidenced Congress' intent to bar survival of vaccine injury cases. In its Order, the Court of Federal Claims held that

> [t]o provide compensation, under the National Vaccine Act, for the prior vaccine injury of a deceased person, would require amending Section 300aa-11(b)(1)(A) to add this category of petition.

(App. C at 7a).

Petitioner seeks review of this case because the lower court's application of *expressio unius* violates other canons of statutory construction, contravenes congressional intent, and results in absurdity. While statutes in derogation of sovereign immunity must be strictly construed, courts should not assume the authority to narrow the waiver beyond what Congress intended. *United States v. Kubrick*, 444 U.S. 111, 118 (1979). As Justice Frankfurter noted in *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955):

> Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.

Justice Stevens also noted, in his dissenting opinion to *Lane v. Pena*, 518 U.S. 187 (1996):

> We appropriately rely on canons of construction as tie-breakers to help us discern Congress' intent when its message is not entirely clear. The presumption against waivers of sovereign immunity serves the neutral purpose in doubtful cases. A rule that refuses to honor such a waiver because it could have been expressed with even greater clarity, or a rule that refuses to accept guidance from relevant and reliable legislative history does not facilitate — indeed, actually obstructs — the neutral performance of the Court's task of carrying out the will of Congress.

Accordingly, review of this case is necessary to ascertain the scope of the government's waiver of sovereign immunity under the Act. However, review would also serve to clarify this Court's

prior rulings regarding construction of similar statutory waivers and provide guidance to lower courts in future cases.

The primary difficulty with the lower courts' application of *expressio unius* to 42 U.S.C. § 300aa-11(b)(1)(A) is that such application violates the cardinal requirement that statutory provisions be construed within the context of the entire legislative enactment. Words and provisions contained in a statute have only a communal existence and must be read as a whole. *King v. St. Vincint's Hospital*, 502 U.S. 215, 221 (1991). The lower courts' interpretation, when read in conjunction with 42 U.S.C. § 300aa-15(a)(1)(B)(ii) and 42 U.S.C. § 300aa-11(a)(2)(A), results in absurdity and clearly contravenes congressional intent.

First, as previously noted, 42 U.S.C. § 300aa-15(a)(1)(B)(ii) expressly permits compensation to persons who have expended funds on behalf of injured vaccine recipient. According to the lower court's interpretation, one would have to believe Congress intended to extinguish a party's right to compensation upon the death of the vaccine recipient, even if such death occurs during the pendency of claim filed under the Act. For example, if Decedent had been alive at the time the petition was filed had received a favorable judgment on the issue of liability, but had died before the Court of Claims determined the amount of compensation due, the lower courts' interpretation would nevertheless require dismissal of the action because the legal representative would not be a proper party to the action.

More importantly, when read in conjunction with 42 U.S.C. § 300aa-11(a)(2)(A), the lower courts' interpretation would effectively abrogate state survival actions for vaccine-related injuries. This provision prohibits claimants from filing an original action in state or federal court for injuries or death resulting from administration of a vaccine. The provision further requires a

claimant to file a petition under subsection (b), receive a judgment, and reject the judgment before initiating a civil action in state or federal court. If, however, the legal representative of a injured vaccine recipient who subsequently died of other causes is not a proper petitioner, the representative is not authorized to file a petition under subsection (b). If the representative is not authorized to file a petition, the representative cannot comply with the requirements of 42 U.S.C. § 300aa-11(a)(2)(A) before filing a state or federal civil action and, thus, any state or federal action would have to be dismissed. In other words, because the representative cannot file a petition in the Court of Federal Claims due to the restrictions of subsection (b) and cannot file a complaint in state or federal court pursuant to subsection (a)(2)(A), the survival action is abrogated by implication.

Clearly, this outcome contravenes Congress' purpose of creating a "compensation program under which awards can be made to vaccine-injured persons quickly, easily, and with certainty and generosity." H.R. Rep. No. 99-908, Part 1, 99th Cong., 2d. Sess. 3, 13 (1986). Rather, the context of the Act and its legislative history indicate that Congress intended to waive sovereign immunity in all cases involving vaccine-related injuries or death, even survival actions filed on behalf of deceased vaccine recipients. Accordingly, Petitioner requests this Court to issue a writ to permit review of the lower courts' decisions.

CONCLUSION

This case presents questions of exceptional importance. First, where strict scrutiny of a statute derogating the federal government's sovereign immunity would result in absurdity and contravene the express purpose of the statute, is it appropriate to look to legislative history and to employ other canons of statutory construction to determine congressional intent. Review would serve to clarify this Court's prior rulings regarding construction of statutory waivers, particularly in the wake of *Lane v. Pena*, 518 U.S. 187 (1996), and provide guidance to lower courts in future cases. Moreover, review will also guide future cases in the Court of Federal Claims by deciding whether claims filed under the National Vaccine Injury Compensation Act for injury incurred as a result of a DPT vaccination survive the death of the vaccine recipient.

Accordingly, Petitioner respectfully requests that her petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT FILED MARCH 11, 1998

97-5140

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

VIRGINIA CONRAD, legal representative of Rick S. Conrad, deceased,

Petitioner-Appellant,

v.

SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent-Appellee.

Judgment

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS

In CASE NO(S). 90-2820V

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

Per Curiam; (MAYER *Chief Judge,* MICHEL, and LOURIE, *Circuit Judges*; *AFFIRMED. See* Fed. Cir. R. 36.

Appendix A

ENTERED BY ORDER OF THE COURT

s/ Jan Horbaly
Jan Horbaly, Clerk

DATED MARCH 11, 1998

ISSUED AS A MANDATE: MAY 4, 1998

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF FEDERAL CLAIMS FILED AUGUST 19, 1997

No. 90-2820 V

IN THE UNITED STATES COURT
OF FEDERAL CLAIMS

VIRGINIA S. CONRAD, AS LEGAL REPRESENTATIVE OF RICK S. CONRAD, DECEASED,

v.

SECRETARY OF THE DEPT. OF HEALTH AND HUMAN SERVICES

JUDGMENT

Pursuant to the court's Order of July 30, 1997,

IT IS ORDERED AND ADJUDGED this date, pursuant to Appendix J ¶30, that Special Master Wright's May 30, 1997, decision dismissing the petition, is sustained.

August 19, 1997

David A. Dampen
Clerk of Court

By: s/ [illegible]
Deputy Clerk

NOTE: As to election, go days from this date or He issuance of the appellate court's mandate, see Appendix J ¶33.

Appendix B

As to attorneys' fees and costs, with 21 days of the above election, see Appendix J ¶12.

As to petition for review, 60 day from this date, see Appendix J ¶32. Petition for review and filing fee of $100.00 should be mailed to the following address: Clerk, U.S. Court of Appeals for the Federal Circuit , 717 Madison Place NW, Washington, DC 20439.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF FEDERAL CLAIMS FILED JULY 30, 1997

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

No. 90-2820V

(Filed July 30, 1997)

VIRGINIA S. CONRAD, as legal Representative of RICK S. CONRAD, deceased,

Petitioner,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent,

ORDER

This National Vaccine Injury Act compensation matter comes before the Court on petitioner's Motion for Review, filed June 30, 1997, and Respondent's Memorandum in Response, filed July 25, 1997.

Proceedings before the Special Master resulted in the determination that the death of the DPT vaccine recipient, on July 23, 1981, did not occur as a result of the vaccination which he had received some 27 years prior thereto. Accordingly, the petition was ordered to be dismissed because 42 U.S.C. § 300aa-11(b)(1)(A) provides for a filing of a petition by ". . . the legal

representative of any person who died as the result of the administration of a vaccine set forth in the Vaccine Injury Table. . . ."

The National Vaccine Injury Act also provides that a civil action may not be brought against a vaccine administrator of manufacturer for damages arising from a vaccine-related injury unless a petition has been filed in this Court for compensation under the Act. 42 U.S.C. § 300aa-11(a)(2)(A).

In this circumstances, the petitioner argues that Congress would not require a petition to be filed, as a prerequisite to further litigation, but not provide any basis upon which the petitioner may file the petition for compensation.

However, the National Vaccine Injury Act simply does not provide for a petition to be filed by the legal representative of a deceased vaccine recipient whose death did not result from the vaccination, 42 U.S.C. § 300aa-11(b)(1)(A); *Buxkemper v. Secretary of Health & Human Services,* 32 Fed. Cl. 213 (1994). At the same time the Act does require the filing of a petition before suit for vaccine injury damages can be commenced against the vaccine administrator or manufacturer, 42 U.S.C. § 300aa-11(a)(2)(A).

In those circumstances where a vaccine causes injury but not a subsequent death, and where under state law a cause of action for personal injury survives the death of the injured party, it would appear that the reason for filing a Vaccine Injury Act compensation petition in this Court by a legal representative of the deceased, is limited to obtaining a judgment that can be rejected pursuant to 42 U.S.C § 300aa-21(a)(2).

Appendix C

Nevertheless, for the reasons expressed in the cited *Buxkemper* ruling, it is concluded that the Decision of the Special Master in the instant proceeding is correct. To provide compensation, under the National Vaccine Injury Act, for the prior vaccine injury of a deceased person, would require amending Section 300aa-11(b)(1)(A) to add this category of petition.

Thus, it is **ORDERED** that Judgement shall be entered sustaining the Special Master's Decision.

s/ James F. Merow
James F. Merow
Judge

APPENDIX D — DECISION OF THE UNITED STATES COURT OF FEDERAL CLAIMS FILED MAY 29, 1997

IN THE UNITED STATES
COURT OF FEDERAL CLAIMS

OFFICE OF SPECIAL MASTERS

(No. 90-2820V)

(Filed May 29, 1998)

Do Not Publish

VIRGINIA S. CONRAD, as Legal Representative of RICK S. CONRAD, deceased,

Petitioner,

v.

SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

Timothy B. Saylor, Canton, Ohio, for petitioners.

David L. Terzian, U.S. Department of Justice, Washington, D.C., for respondent.

Appendix D

DECISION

WRIGHT, Special Master

On October 1, 1990, petitioner filed a claim on behalf of Rick S. Conrad (Rick) under the National Vaccine Injury Compensation Program (hereinafter "Vaccine Act" or the "Act.")[1] Petitioner claimed that as a direct result of a DTP vaccination administered on March 15, 1954, Rick suffered an encephalopathy within 72 hours of the vaccination, resulting in his death 27 years later on July 23, 1981. On May 31, 1994, respondent filed a report in this matter recommending compensation be denied.

As an initial matter, the Vaccine Act requires that in order to enjoy a presumption of causation, not only must a Table injury occur within 72 hours of the vaccination in question, but any subsequent injury or death for which a petitioner seeks compenstaion must be a *sequela* of the injury. Section 14(a)(I)(E). Petitioner, therefore, must prove that Rick's death was the sequela of an otherwise compensable Table injury. *See Hellebrand v. Secretary of HHS*, 999 F.2d 1565 (Fed. Cir. 1993); *Hodges v. Secretary of HHS*, 9 F.3d 958 (Fed. Cir. 1993).

> [A] preponderance of the evidence must show that some logical, direct casual link exists between the presumed Table injury and the alleged sequela. This is not a difficult burden, and requires far less than medical certainty. Yet, the petitioners . . . must present some evidence, such as expert testimony, fact testimony, or documentation, to convince the special

1. The National Vaccine Injury Compensation Program comprises Part 2 of the National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (codified as amended at 42 U.S.C.A. §§ 300aa-1 through -34 (West 1991 & Supp. 1997)). References shall be to the relevant subsection of 42 U.S.C.A. § 300aa.

> master that, more likely than not [the alleged sequela was connected to the Table injury].

Hossack v. Secretary of HHS, 32 Fed. Cl. 769, 776 (1995) (Court affirmed special master's finding that death was sequela of a Table injury.

According to the Act, in cases involving vaccines administered prior to the effective date of the Act, as in this case, compensation may only be awarded for a "*vaccine-related* injury or death." Section 15(b) (emphasis added). Furthermore, Section 15(a)(2) specifically states that, in a case where the child is deceased, compensation may be awarded "[i]n the event of a *vaccine-related* death." (emphasis added).

On April 14, 1997, petitioner filed the supplemental medical report of Dr. John Conomy. In his report, Dr. Conomy states:

> He [Rick] died of an intracerebral hemorrhage which in my opinion, furthermore, and to the same reasonable degree of medical certainty, was not a direct effect of his encephalitic disease. Intracerebral hemorrhages are common terminal events in varieties of persons and they are most frequently due to trauma or hypertension.

A status conference was held in this matter on May 27, 1997. At the conference, the undersigned noted that petitioner's expert, Dr. Conomy, does not believe that Rick's death was vaccine-related. The undersigned gave petitioner the opportunity to seek another expert opinion. Petitioner, however, represented that she would not seek another expert opinion in this matter.

Appendix D

Based upon the record as its stands, I cannot find that petitioner has met her burden of proof by a preponderance of the evidence in this matter. In Petitioner's own expert stated to a reasonable degree of medical certainty that Rick's death was not a sequela of his DPT vaccination. Thus, I cannot find the petitioner is entitled to compensation in this case under the Vaccine Act. The petition is therefore DISMISSED. In the absence of a motion for review filed pursuant to RCFC Appendix J, the clerk of the court is hereby directed to enter judgment in accordance herewith.

IT IS SO ORDERED.

s/ Elizabeth E. Wright
Elizabeth E. Wright
Special Master